Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-76

TOPIC, MARGARET ANDERSON, ELEANOR NOWICKI, WILLIAM BOWERS, ELIZABETH BOWERS, WILLIAM FERGUSON, HELEN FERGUSON, MIGUEL SILVA, CARL FARRINGTON, CAMILLE FARRINGTON, PATTY MORTL, MICHAEL MORTL, EDWARD MIDGET and LOUISE MIDGET, individually and on behalf of all others similarly situated,

Petitioners,

vs.

CIRCLE REALTY COMPANY, SPRING REALTY COMPANY, and SHOREWOOD REALTY COMPANY,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CARL B. PEARLSTON, JR.
2706 Artesia Boulevard
Redondo Beach, CA 90278
(213) 376-8777
Attorney for Respondent
Shorewood Realty Company

ARTHUR W. FRANCIS, JR.
JONES and WILSON
5900 Wilshire Boulevard
Suite 1430
Los Angeles, CA 90036
(213) 936-8216
Attorneys for Respondents
Circle Realty Company and
Spring Realty Company

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JONES and WILSON
5900 Wilshire Boulevard
Suite 1430
Los Angeles, CA 90036
(213) 936-8216
Attorneys for Respondents
Circle Realty Company and
Spring Realty Company

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Petitioners,

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Respondents.

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI TO THE
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QUESTION PRESENTED

WHETHER, UNDER §812 OF TITLE VIII OF THE CIVIL RIGHTS ACT OF 1968 (42 U.S.C. §3612), INDIVIDUAL HOMEOWNERS HAVE STANDING TO SUE REAL ESTATE COMPANIES FOR THEIR ALLEGEDLY RACIALLY DISCRIMINATORY PRACTICES TOWARD THIRD PARTIES.

STATEMENT OF THE CASE

A. PROCEEDINGS IN THE COURTS BELOW

Petitioner/Plaintiffs filed separate, yet almost identical, class actions against five realty companies (Circle Realty Company, Spring Realty Company, Shorewood Realty Company, Imperial Realty Company, and Nu-Way Realty) on 6 March 1974 in U.S. District Court, under the provisions of §812 of Title VIII of the Civil Rights Act of 1968, hereinafter "the Act", (42 U.S.C. §3612), alleging violations of §804 of the Act (42 U.S.C. §3604), as well as of the Civil Rights Act of 1866 (42 U.S.C. §1982). Thereafter, on 3 April and 9 April 1974 respectively, defendant Shorewood Realty Co. and defendants Circle Realty Co. and Spring Realty Co. (hereinafter collectively referred to as "respondents"), filed Motions to Dismiss petitioners' complaints pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on the grounds that petitioners' complaint failed to state a claim upon which relief could be granted; that petitioners had no standing to raise the allegations of violation of 42 U.S.C. §1982

and 42 U.S.C. §3604; that they had no standing under 42 U.S.C. §3612; and that there was no actual case or controversy within the meaning of Article III of the Constitution. Said motions were denied by the District Court on 20 May 1974 but the actions were certified for interlocutory appeal pursuant to 28 U.S.C. §1292(b) and Rule 5 of the Federal Rules of Appellate Procedure, and all proceedings of the lower court were stayed pending appeal. 377 F.Supp. 111 (C.D. Calif. 1974). See Appendix p. 8a.

On 18 June 1974, pursuant to Application for Leave to Take Interlocutory Appeal by respondents, the U. S. Court of Appeals for the Ninth Circuit granted permission for the taking of the Interlocutory Appeal.

On 17 March 1975, before arguments had been heard by the Court of Appeals, the Civil Rights Division of the United States Justice Department, Office of the U.S. Attorney General, filed suit against each of the respondents hereinunder 42 U.S.C. §3613 (United States v. Frank Jedziniak dba Circle Realty Co. et al., C.A. No.

75-935-LTL, C.D. Calif.) to protest a policy and practice of racial discrimination and a denial of rights protected under the Act.

The Court of Appeals reversed the District Court on 23 March 1976 and held that the petitioners had no standing to sue under 42 U.S.C. §3612. 532 F.2d 1273 (9th Cir. 1976). See Appendix p. 8a.

B. STATEMENT OF THE FACTS

Petitioner T.O.P.I.C. is an unincorporated association formed on or about 29 October 1972 with the alleged purpose "To Preserve Integrated Community". T.O.P.I.C. is defined within petitioners' complaints as being an interracial volunteer organization with approximately 100 member families living in the cities of Torrance and Carson, California, and the unincorporated section of Los Angeles County between those cities referred to as the Los Angeles County Strip. The total area of the aforementioned governmental entities encompases more than 40 square miles, and contains a population of approximately 222,000 persons. Petitioners' complaints define the purposes of T.O.P.I.C. as being

to eliminate unlawful racial discrimination against its members and other persons in the marketing and sale of housing in the aforementioned areas.

During the period from July to November 1973, T.O.P.I.C. proceeded to conduct an investigation using teams of black and white couples posing as prospective homeseekers, which visited some seventeen realty companies, including respondents herein. This investigation appeared to focus on whether said realty companies were engaged in a practice referred to by T.O.P.I.C. as "racial steering", defined in their complaints as "the practice of directing non-white homeseekers to housing in designated minority residential areas, and of directing white homeseekers to housing in designated white residential areas." Each of the separate complaints filed by T.O.P.I.C described a small number of allegedly specific encounters between the "testers" and a few of the salesagents of the various realty companies. These "testers", armed with hypothetical factual situations concerning their alleged need for particular housing, contacted various real estate salesagents,

and purportedly gave a list of specific housing needs to such salesagents, including an alleged stated preference for the area in which they desired to look for houses. Some of these "testers" were allegedly informed for various reasons by such salesagents that they should consider looking at available housing in other areas.

Petitioners characterized the results of these specific encounters as violative of the provisions of the Fair Housing Act of 1968, 42 U.S.C. §3601 et seq., and the Civil Rights Act of 1866, 42 U.S.C. §1982. Petitioners alleged that they were injured by the respondent's alleged practices "by being deprived of the important social and professional benefits of living in an integrated community, and moreover they have suffered and will continue to suffer embarrassment and economic damage in their social and professional activities from being stigmatized as residents of either white or black ghettos... ."

REASONS WHY THE WRIT SHOULD BE DENIED

THE WRIT SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS BELOW IS CONSISTENT WITH THIS COURT'S DECISION IN BOTH TRAFFICANTE v. METROPOLITAN LIFE INSURANCE CO. AND ITS MORE RECENT DECISIONS ON STANDING IN WARTH v. SELDIN AND SIMON v. EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION, AS WELL AS THE STATUTORY LANGUAGE ITSELF.

A. THE COURT OF APPEALS DECISION IS IN HARMONY WITH THIS COURT'S DECISION IN TRAFFICANTE v. METROPOLITAN LIFE INSURANCE CO., AS WELL AS THE MORE RECENT DECISIONS ON STANDING IN WARTH v. SELDIN AND SIMON v. EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION

Contrary to the assertion made by petitioners that Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972), was a case arising out of §812 of the Act (42 U.S.C. §3612) as well as §810 (42 U.S.C. §3610), a careful reading of this Court's decision in Trafficante indicates that only §810 (§3610) was discussed as a ground for finding standing in the

plaintiffs there. The entire first portion of this Court's opinion in Trafficante deals with those plaintiffs' complaints to H.U.D. pursuant to §810(a) of the Act (§3610) and clearly states:

> "...petitioners brought this action in the District Court under §810(d) of the Act." 409 U.S. at 208.

This Court then proceeded to discuss "The definition of 'persons aggrieved' contained in §810(a) ... ." Ibid. This term does not appear in §812. This Court then noted the similarity of the phrase "persons aggrieved" in §810 to the phrase "the person claiming to be aggrieved" used in the Civil Rights Act of 1964, and stated:

> "The words used showed a 'Congressional intention to define standing as broadly as is permitted by Article III of the Constitution.'" 409 U.S. at 209.

In another instance clearly showing that only §810 was under discussion by this Court, Mr. Justice Douglas, writing for this Court, stated:

> "The key section now before us, i.e. §810,... ." 409 U.S. at 210.

Finally, the direct holding of this Court was:

> "We can give vitality to §810(a) [§3610] only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities under the auspices of HUD." 409 U.S. at 212.

The specific concurrence of Mr. Justice White, Mr. Justice Blackmun, and Mr. Justice Powell is in direct point, when they stated of the Civil Rights Act of 1968:

> "But with that statute purporting to give all those who are authorized to complain to the agency the right also to sue in Court, I would sustain the statute insofar as it extends standing to those in the position of the petitioners in this case." 409 U.S. at 212 (emphasis added).

Clearly, those who are "authorized to complain" are the "persons aggrieved" defined in §810(a) of the Act, and not those who enforce their rights under §812 [§3612].

Thus, it is clear that this Court, in Trafficante, was dealing only with §810 [§3610] of the Act, and did not decide that the same criteria for standing to sue would be followed under §812 [§3612]; therefore, the Court of Appeals' decision is entirely consistent with this Court's decision in Trafficante.

Petitioners have also urged that they should be recognized as "private attorneys general" to represent the public interest, and cite Trafficante as authority. Although this Court talked approvingly of "private attorney general actions" in Trafficante (409 U.S. at 211), it was noted that such "private attorney general" actions were necessary due to the limited resources of the Justice Department's Civil Rights Division. Petitioners have failed to disclose to this Court that there is a pending suit in the lower court by the Civil Rights Division of the Justice Department against these same respondents,

alleging the same wrongs and requesting the same relief. This pending suit eliminates any rationale for finding standing in the petitioners to act as a private attorney general. There is no need for a private attorney general action when the real Attorney General is in the process of representing the actual public interest.

With reference to the lower court decisions which petitioners claim have been at odds with the Court of Appeals' decision in this case, it should be noted that the examples given [Village of Park Forest v. Fairfax Realty, P.H.E.O.H. Rptr. ¶13,699 (N.D. Ill. 1975) and Heights Community Congress v. Rosenblatt Realty Co., P.H.E.O.H. Rptr. ¶13,702 (N.D. Ohio (1975) are both cases wherein the Court's decision to find standing in plaintiffs cited the lower court decision in this instant case (377 F.Supp. 111) as prior and compelling precedent. This "bootstrap" approach is hardly persuasive authority for attacking the contrary decision of the Court of Appeals which is the subject of the petition in this matter.

This Court has recently amplified and

elucidated its opinion in Trafficante in the recent cases of Warth v. Seldin, 422 U.S. 490 (1975), and Simon v. Eastern Kentucky Welfare Rights Organization, ___U.S.___, 96 S.Ct. 1917, 43 L.Ed.2d 450 (1976). This Court makes clear in Warth, supra, in explaining Trafficante, that the decision in Trafficante granting standing was based upon the express language of §810(a) of the Act (42 U.S.C. §3610), in which Congress granted an express right of action to "persons aggrieved", and that this broad definition would include persons who otherwise would be barred by prudential standing rules of the Court from judicial relief, since they were essentially seeking such relief for actions harmful to third parties. This Court concluded:

> "...that Congress had given residents of housing facilities covered by the statute an actionable right to be free from the adverse consequences to them of racially discriminatory practices directed at and immediately harmful to others. 409 U.S. at 212." 422 U.S. at 513.

This Court's decision in Trafficante decided that residents of housing facilities were deemed to be "aggrieved persons" within the meaning of §3610 of the Act for purposes of suing the management of those facilities for racially discriminatory practices directed toward third parties. This Court expressly did not decide whether those residents of housing facilities had an equal right to sue under §3612. Nor did the Court decide that parties having different interests, as in the present case where homeowners are suing real estate brokers for alleged discriminatory practices toward third parties, would be equally considered to be "aggrieved persons" within the meaning of the Act, even assuming they were suing under §3610. As the Court of Appeals in the instant case pointed out, there is an important distinction between this case and Trafficante in that

> "... the petitioners here are not residents of a single apartment complex, but rather of a section of metropolitan Los Angeles with a population exceeding 100,000. Therefore, the role played by

defendants' alleged racial steering in denying the plaintiffs the benefits of living in an integrated community may be so attenuated as to negate the existence of any injury-in-fact. It is quite possible that, even absent the defendants' discriminatory practices, Carson and Torrance would still be segregated communities, see Warth v. Seldin, 422 U.S. 490, 504-08... ."

While this point of the speculative nature of the relationship between the alleged practices of defendants/respondents and the injuries claimed by the plaintiffs/petitioners was not essential to the Court of Appeals' holding in this matter, it is pertinent to note that this Court, in the recent case of Simon, supra, has apparently endorsed the view of the Circuit Court. In that case, this Court stated:

"In sum, when a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be

redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Article III limitation." 96 S.Ct. at 1924.

The Court further stated:

"In other words, the 'case or controversy' limitation of Article III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant. ..." 96 S.Ct. at 1926.

and concluded that:

"The principal of Linda R.S. and Warth controls this case. As stated in Warth, that principal is that indirectness of injury, while not necessarily fatal to standing, 'may make it substantially more difficult to meet the minimum requirement of Article III; to establish that, in fact, the asserted injury was the consequence of the defendant's actions or that prospective relief will

remove the harm' 422 U.S. at 505." 96 S.Ct. at 1927. (emphasis added)

This point, which was raised by the Court of Appeals and endorsed by this Court, is an additional reason why this Court should not grant the Writ, in that, even if, arguendo §3610 and §3612 were deemed to be equal alternative remedies, petitioners would still not be within the class of persons to whom the protection of the statute extends, and they would still lack standing to sue.

B. THE COURT OF APPEALS' DECISION IS IN HARMONY WITH BOTH THE LEGISLATIVE HISTORY OF THE ACT AND THE STATUTORY LANGUAGE ITSELF

Contrary to petitioners' attempt to show the clear intention of Congress in adopting §3610 and §3612 of the Act, respondents agree with this Court when it stated in Trafficante:

"The legislative history of the Act is not too helpful." 409 U.S. at 210.

Rather than relying on the somewhat ambiguous legislative history, and the

uncertain light it casts upon the extent of Congressionally granted standing under either §§ 3610 or 3612 of the Act, respondents believe that the statutory language and statutory design itself amply illustrate the Congressional purpose. There are three enforcement sections in the Act: §§ 3610, 3612, and 3613. See Appendix p. 14a.

Section 3610 grants a right to file an administrative complaint with the Secretary of the Department of Housing and Urban Development (HUD) to any "person aggrieved" by an alleged discriminatory housing practice, and that person may subsequently file a lawsuit after a specified lapse of time.

Section 3613 gives the United States Attorney General the right to initiate actions in the public interest to protest a policy or practice of housing discrimination or a generalized denial of rights.

Section 3612 merely states that "The rights granted by §§ 3603, 3604, 3605, and 3606 of the Title may be enforced by civil actions... ."

Sections 3610 and 3612 are complementary forms of relief, as the Court of Appeals has noted. Those persons who are directly injured by a discriminatory housing practice, and who may need an immediate judicial remedy to prevent a bona-fide renter or purchaser from taking property beyond the reach of a Court, are entitled to sue under §3612. (See 82 Harv. L. Rev. at 857-858). Reinforcing this view is the fact that §3614 (See Appendix p. 13a) requires expedited judicial procedures for cases brought pursuant to §3612, but it does not require such expedited action for cases brought under §3610. An action under §3612 lies to enforce the rights of §§ 3603 through 3606 of the Act, which are aimed at individual discrimination. In contrast, §3610 is quite broad in its coverage ("persons aggrieved"), but it requires an initial resolution of disputes in the administrative context, which protects the judicial forum from a potential excess of litigation. Furthermore, as the Court of Appeals noted in the instant case, conciliation at the Agency level might be a

superior remedy to the instant lawsuit in achieving the goal of an integrated community, which would be necessary to redress the injuries that petitioners claim to have suffered from living in segregated communities due to respondents' alleged acts. As was previously noted, in Warth and Simon, supra, the petitioners must show that prospective judicial relief will remove the harm which appears doubtful.

Petitioners are only partially correct when they state that lower courts have found that §§ 3610 and 3612 provide alternative remedies for housing discrimination, in that they have failed to note that the lower courts have not held that these are equally available alternative remedies for all persons. The courts have, however, uniformly held that the person who is the direct victim of a discriminatory housing practice has alternative remedies in §§ 3610 and 3612, which is precisely the holding of the Court of Appeals in this case. For example, in Brown v. Lo Duca, 307 F.Supp. 102 (E.D. Wisconsin 1969), followed in Johnson v.

Decker, 333 F.Supp. 88 (N.D. Calif. 1971), there is a detailed analysis of the Act and the remedies under §3610 and §3612. The court stated that the alternative remedy of §3612 is available

> "...for one who claims to have been discriminated against in the sale or rental of housing." 307 F.Supp. 103.

Petitioners clearly do not satisfy this criteria of direct harm.

There is a further significant difference between §§ 3610 and 3612, and that is the requirement in §3610(c) and (d) for the utilization of available state and local fair housing laws and agencies, in lieu of the federal agency, as well as the restriction on suit in the federal forum if there is a judicial remedy under a state or local fair housing law which provides rights and remedies equivalent to those of the federal law. This gesture of comity towards the delicate balance of federalism does not appear in §3612, which has no state or local agency involvement preconditions on the right of suit in the federal forum. To permit

parties to bypass available state or local administrative and judicial remedies can only be justified if there is an immediate need for a prompt federal judicial intervention to protect persons who are the direct victims of alleged discriminatory racial practices, as opposed to those who are indirectly injured by alleged discriminatory practices directed at third parties.

CONCLUSION

The decision of the Court of Appeals precluding standing under §3612 of Title VIII for persons in the position of petitioners here, is consistent with this Court's prior decisions, as well as the statutory language and design, and the necessity for preserving a balance in federal-state relationships.

Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CARL B. PEARLSTON, JR.
Attorney for Respondent
Shorewood Realty Company

ARTHUR W. FRANCIS, JR.
JONES and WILSON
Attorneys for Respondents
Circle Realty Company and
Spring Realty Company

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
C. D. CALIFORNIA

Nos. CV-74-591-JWC, CV-74-592-JWC, CV-74-594-JWC

TOPIC et al., *Plaintiffs,*

v.

CIRCLE REALTY COMPANY, *Defendant.*

TOPIC et al., *Plaintiffs,*

v.

SPRING REALTY COMPANY, *Defendant.*

TOPIC et al., *Plaintiffs,*

v.

SHOREWOOD REALTY COMPANY, *Defendant.*

May 20, 1974.

Memorandum Opinion

CURTIS, *District Judge.*

The plaintiffs have filed three almost identical Civil Rights actions seeking to enjoin the defendants, (real estate firms) from engaging in alleged discriminatory practices in violation of the Fair Housing Act of 1968, more correctly called the "Civil Rights Act of 1968," Title VIII, 42 U.S.C. § 3601 et seq.

Jurisdiction is invoked under 28 U.S.C. § 1343(4) and 42 U.S.C. § 3612 to remedy alleged violations of 42 U.S.C. § 3604. Plaintiffs also allege a claim under the 1866 Civil Rights Act, 42 U.S.C. § 1982.

Motions to dismiss have been filed on the part of all defendants, and since precisely the same questions of law are

raised in each case, the motions were heard together and the court renders this single opinion which is equally applicable to all three cases.

It is alleged in the plaintiffs' complaint that the plaintiff, TOPIC, is an unincorporated association formed October 4, 1972, its purpose being "To Preserve an Integrated Community", from which the name TOPIC is derived. The complaint further alleges:

> "TOPIC is an interracial, volunteer organization with approximately 100 member families living in the cities of Torrance and Carson, California, and in the unincorporated section of Los Angeles County between the cities of Carson and Torrance (hereinafter the 'L.A. County strip'). One of the purposes of TOPIC is to eliminate unlawful racial discrimination against its members and against other persons in the marketing and sale of housing in the cities of Torrance and Carson, and in the L. A. County strip. TOPIC seeks to assure to its members the right to the important social and professional benefits of interracial associations that arise from living in an integrated community."

The individual plaintiffs, some of whom are black and some of whom are white, reside within the community embracing the Torrance, Carson and L. A. County strip area. From July to November 1973, TOPIC conducted an investigation to determine whether the policies and practices of real estate firms doing business in that area were in compliance with the Civil Rights Act of 1866 and the Civil Rights Act of 1968. The investigation focused on whether these real estate firms were engaged in "racial steering", which plaintiffs characterize as the "practice of directing non-white homeseekers to housing in designated minority residential areas," a practice prohibited by the Civil Rights Act of 1968.

The investigation was conducted by the use of teams of black and white couples posing as homeseekers, whose

housing needs and financial ability were for all intents and purposes about equal. These testing teams visited some 17 realty companies, including the defendants.

The complaint then describes a number of specific encounters between the members of the testing teams and the agents of the real estate firms, which conduct plaintiffs allege is a "part of the company's continuing policies and practices to limit, classify, segregate, and otherwise discriminate on the ground of race in the sale of housing."

The plaintiffs contend they are injured by these practices "by being deprived of the important social and professional benefits of living in an integrated community. Moreover, they have suffered and will continue to suffer embarrassment and economic damage in their social and professional activities from being stigmatized as residents of either white or black ghettos . . . ."

Although it may well be argued that some of the conduct as alleged does not violate the Acts, for the purposes of this motion, only, I will accept plaintiffs' characterization of defendants' practices as that of "racial steering" such as is prohibited.

The threshold question is: Do these plaintiffs have standing to maintain this action? The defendants contend that they do not since the alleged steering was not practiced upon the plaintiffs. If it occurred at all, defendants argue, it occurred with respect to testing teams who are not in reality homeseekers or purchasers. Defendants argue there has been no individual injury alleged. Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

The plaintiffs, however, rely on the recent case of Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972). In this case, two tenants in Parkmerced, an apartment complex in San Francisco, brought an action against the landlord, charging discrim-

inatory practices against nonwhite rental applicants. Such practices included making it known to them that they would not be welcome at Parkmerced, manipulating a waiting list for apartments, delaying action on their applications, using discriminatory acceptance standards and the like. The tenants claimed that they had been injured in that (1) they had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would have accrued if they had lived with members of minority groups; (3) they had suffered embarrassment and economic damage in social, business and professional activities from being stigmatized as residents of a white ghetto. The District Court held that the tenants were not within the class of persons entitled to sue under the Act. 322 F.Supp. 352. The Court of Appeals affirmed, construing 42 U.S.C. § 3610(a) narrowly to permit complaints only by persons who were the objects of discriminatory housing practices. 9 Cir., 446 F.2d 1158. The Supreme Court, however, reversed, holding that the tenants had a right to sue. The Court pointed out that § 3610(a) extends the right to sue to "[a]ny person who claims to have been injured by a discriminatory housing practice" and that such language showed a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.[1] Congress further recognized that "[w]hile members of minority groups were damaged the most from discrimination in housing practices . . . those who were not the direct objects of discrimina-

[1] In Hackett v. McGuire Brothers, Inc., 445 F.2d 442 (3rd Cir. 1971) the court allowed a suit to be started by "a person claiming to be aggrieved" under the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a) concluding that the words used showed "[A] congressional intention to define standing as broadly as is permitted by Article III of the Constitution." *Id.* 446. The Supreme Court in the *Trafficante* case reached the same conclusion with respect to plaintiffs in a suit brought under the Civil Rights Act of 1968 insofar as they are tenants of the same housing unit that is charged with discrimination.

tion had an interest in ensuring fair housing, as they too suffered."[2]

The Court also noted:

> "The language of the Act is broad and inclusive. Individual injury or injury in fact to petitioners, the ingredient found missing in Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636, is alleged here. What the proof may be is one thing; the alleged injury to existing tenants by exclusion of minority persons from the apartment complex is the loss of important benefits from interracial associations."

The Supreme Court's logic appears to apply with equal force and relevance to the facts before this court, and I would have no hesitancy in applying it here were it not for the clear indication that the Court in *Trafficante* was extending standing to sue only to tenants of a housing project complaining of discriminatory practices of the management. The Court's language presupposes some outer limits to the rule enunciated, but the situations in the two cases are so similar there seems to be no just reason for setting such limits short of the facts of the case before this court.

It is, of course, true that the apartment complex with which the Supreme Court was dealing had a resident population of approximately 8,200 residents, whereas the Torrance-Carson community has a population of something over 100,000. Its residents, however, live in a closely settled area.[3] Those residing in this community buy from the same stores, attend the same churches, send their chil-

[2] See Hearings before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency on S.1358, S.2114, and S.2280, 90th Cong., 1st Sess. (1967).

[3] Although the record makes no reference to the population or area of the Torrance-Carson community, the court takes judicial notice of these facts.

dren to the same schools. They are served by the same recreational facilities and enjoy the same cultural opportunities. If any of the 8,200 residents of an apartment complex can be injured by virtue of the loss of important benefits from interracial associations surely the residents of the Carson-Torrance community can and do suffer similar deprivations.

One further question remains. Since the testers were not, in fact, real purchasers and therefore any steering as to them would cause no effect, whatever, upon the racial balance of the community, do these cases, in fact, involve actual controversies in the constitutional sense?[4]

Section 3604 of Title 42 prohibits certain discriminatory practices without regard to their actual effect upon the community. So when a plaintiff alleges that the defendants have engaged in a prohibited discriminatory practice, all that is needed to support an injunction is proof that the practice exists. The Supreme Court in *Trafficante* pointed out that the Act contemplated its enforcement not only by the Attorney General, but also by aggrieved persons acting as "private attorneys general." This practice, the Court continues,

> "[S]erves an important role in this part of the Civil Rights Act of 1968 in protecting not only those against

[4] Unless a case or controversy exists, Article III of the Constitution precludes the exercise of judicial power. North Carolina v. Rice, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971). To be justiciable, a controversy " '[M]ust be definite and concrete, touching the legal relations of parties having adverse legal interests . . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241 [57 S.Ct. 461, 464, 81 L.Ed. 617] (1937)." *See also* Isaacs Brothers Company v. Hibernia Bank, 481 F.2d 1168, 1170 (9th Cir. 1973).

> whom a discrimination is directed but also those whose complaint is that the manner of managing a housing project affects 'the very quality of their daily lives.' Shannon v. United States Dept. of Housing & Urban Dev., 436 F.2d 809, 818 (CA3)." *Id.* 211.[5]

For the foregoing reasons, the defendants' motions to dismiss in all cases are denied.

This court is of the opinion that the order denying the defendants' motions to dismiss involves a controlling question of law as to which there is substantial grounds for a difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. These cases are therefore certified for immediate appeal and all proceedings herein shall be stayed pending such appeal.

[5] In *Trafficante* the plaintiffs were proceeding under Title 42 U.S.C. § 3610(d), where as the plaintiffs in the case before us are proceeding under 42 U.S.C. § 3612. This distinction is irrelevant for it seems clear that the congressional intention was to define the right to sue under § 3612 at least as broadly as under § 3610(d).

The plaintiffs, here, also seek relief in count II pursuant to the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1982. The District Court in the *Trafficante* case dismissed a similar count on the ground that there was no standing and the Circuit Court affirmed. The Supreme Court did not reach this question and consequently did not reverse this decision. Upon the authority, therefore, of the Circuit Court's opinion, I would hold that the plaintiffs have no standing to sue under the provisions of § 1982.

TOPIC *et al., Appellees,*

v.

CIRCLE REALTY *et al., Appellants.*

No. 74-2147.

United States Court of Appeals,
Ninth Circuit.

March 23, 1976

Opinion

Before CHAMBERS, TRASK and KENNEDY, *Circuit Judges.*

ANTHONY M. KENNEDY, *Circuit Judge:*

This is an interlocutory appeal from the district court's refusal to dismiss actions to enjoin three Los Angeles real estate brokers from alleged violations of the Fair Housing Act of 1968, 42 U.S.C. § 3604, and the Civil Rights Act of 1866, 42 U.S.C. § 1982.[1] Jurisdiction in the district court was based on the Fair Housing Act, 42 U.S.C. § 3612, and on 28 U.S.C. § 1343(4). The plaintiffs are TOPIC,[2] an unincorporated association, and three individual members. The district court denied the motion to dismiss, holding that plaintiffs had standing to sue under the Fair Housing Act.[3]

TOPIC is an organization of approximately one hundred families, both black and white, living in the cities of

[1] The district court properly certified the order for interlocutory appeal under 28 U.S.C. § 1292(b). On June 18, 1974, a panel of this court granted appellants' petition for interlocutory appeal.

[2] The name of the organization is derived from the phrase, "to preserve an integrated community."

[3] The opinion below is reported at 377 F.Supp. 111 (C.D.Cal. 1974).

Torrance and Carson, California, and in the unincorporated portion of Los Angeles County which lies between those cities. The declared purpose of TOPIC is to combat racial discrimination and eliminate race as a factor in the marketing of housing for the geographical area where its members reside.

During 1973 TOPIC used teams of black couples and white couples posing as home seekers to investigate the business practices of real estate brokers in Torrance and Carson. Based on this investigation TOPIC concluded that the defendant real estate brokers engage in "racial steering," defined in the complaints as the practice of "directing non-white home seekers to housing in designated minority residential areas, and directing white home seekers to housing in designated white residential areas." These actions charge that such steering violates the Fair Housing Act, 42 U.S.C. § 3604(a), (b) and (d).[4] None of the plaintiffs were actual homeseekers subjected to racial steering; rather, these plaintiffs alleged that they are injured by the defendants' activities in that they are:

> being deprived of the important social and professional benefits of living in an integrated community. Moreover, they have suffered and will continue to suffer embarrassment and economic damage in their social and professional activities from being stigmatized as residents of either white or black ghettoes . . .

[4] Each complaint alleged a cause of action under 42 U.S.C. § 1982. The court below correctly noted that the law of this circuit established in *Trafficante* v. *Metropolitan Life Insurance Co.*, 446 F.2d 1158, 1163-64 (9th Cir. 1971) and left undisturbed by the Supreme Court's reversal on other grounds, 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972), required the dismissal of the counts based on § 1982, 377 F.Supp. at 115 n. 5. The order of the court, however, fails expressly to dismiss that count. From reading the court's opinion in its entirety it is clear that the language of footnote 5 was intended as a dismissal of the counts based on § 1982, and that portion of the order is hereby affirmed.

As a general rule, litigants do not have standing to assert the rights of third parties who may have been injured by unlawful conduct. However, a statute may accord such standing to a "private attorney general," as long as the unlawful conduct has also caused him injury-in-fact sufficient to satisfy the case or controversy requirement of article III. Here the injury alleged by TOPIC and its members is similar to that in *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 208, 93 S.Ct. 364, 366, 34 L.Ed.2d 415, 418 (1972). There the Supreme Court held that the Fair Housing Act in 42 U.S.C. § 3610, conferred standing broadly enough to include tenants of a large apartment complex challenging their landlord's alleged discrimination in the rental of apartments. The Court's conclusion was based on the purpose and structure of the Act, and the expansive definition of "person aggrieved" in section 3610.

There are, however, two significant distinctions between the instant case and *Trafficante*. First, the plaintiffs here are not residents of a single apartment complex, but rather of a section of metropolitan Los Angeles with a population exceeding 100,000. Therefore, the role played by defendants' alleged racial steering in denying the plaintiffs the benefits of living in an integrated community may be so attenuated as to negate the existence of any injury in fact. It is quite possible that, even absent the defendants' discriminatory practices, Carson and Torrance would still be segregated communities. *See Warth* v. *Seldin*, 422 U.S. 490, 504-08, 95 S.Ct. 2197, 2208-10, 45 L.Ed.2d 343, 358-60 (1975).

However, we need not reach this constitutional issue because of the second distinction with *Trafficante*. This action was brought under section 3612 rather than section 3610. We hold that the language of section 3612 does not authorize lawsuits to vindicate the rights of third parties. The plaintiffs therefore failed to state a claim for which

relief could be granted under the jurisdictional section invoked, and the district court should have dismissed the action on that ground.

Section 3610 permits suit by "any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur . . .." By contrast, section 3612 simply provides that "[t]he rights granted by [section 3604, *inter alia*] may be enforced by civil actions" in federal or state courts.

The Supreme Court has recently characterized its earlier interpretation of section 3610 in *Trafficante* as giving residents of housing facilities "an actionable right to be free from the adverse consequences to them of racially discriminatory practices directed at and immediately harmful to others." *Warth* v. *Seldin, supra*, 422 U.S. at 513, 95 S.Ct. at 2212, 45 L.Ed.2d at 363. The narrower language of section 3612, on the other hand, precludes suit by such individuals. By permitting suit only to enforce certain enumerated rights, that section provides access to the courts only to those who are granted rights by the Act, namely, those who are the direct objects of the practices it makes unlawful.

Section 3604 grants rights not to be discriminated against in the sale or rental of housing. The plaintiffs in the instant case were already homeowners or renters; they did not make bona fide efforts to buy or rent housing. *Cf. Pegues* v. *Bakane*, 445 F.2d 1140, 1142 (5th Cir. 1971) (section 3612 held inapplicable because plaintiff failed to make actual offer to purchase property). Although the complaint alleges that racial steering is a practice which violates section 3604, we conclude that only the direct victims of such a practice have a cause of action under section 3612.

Our conclusion is consistent with the statutory design. Sections 3610 and 3612 provide complementary enforce-

ment procedures under the Fair Housing Act. Section 3610 permits suit by a broad spectrum of potential plaintiffs, but requires compliance with certain preliminary procedures before redress may be sought in federal court. Persons aggrieved by discriminatory housing practices must, under section 3610, file a complaint with the Secretary of Housing and Urban Development, who may take up to 30 days to investigate it and determine whether to resolve it administratively The Secretary may seek to eliminate or correct the alleged discriminatory practice by informal methods of conference, conciliation and persuasion. Where state or local fair housing legislation provides rights and remedies substantially equivalent to the rights and remedies provided by federal law, the Secretary is directed to give the local authorities first opportunity to resolve the matter. In either event no suit may be brought for an additional thirty days while the conciliation process is taking place. Even then no action may be brought in federal district court if substantially equivalent remedies may be obtained under state law.

By contrast to the above, section 3612 has no pre-conditions to suit. Those entitled to bring an action under this section have immediate access to a federal forum.

This comparison demonstrates the functions served by the distinct jurisdictional grant of each section. Section 3610 contemplates the resolution of disputes in the slower, less adversary context of administrative reconciliation and mediation. While this section provides a remedy for a broad spectrum of individuals aggrieved by discrimination, the judicial system is not the initial forum for relief and thus is protected from a potential excess of litigation. Section 3612 provides preferential access to judicial processes as necessary for those individuals who are the primary victims of the illegal acts of discrimination. Such persons are likely to suffer grave and immediate harm and judicial relief may be necessary for the full vindication of

their rights. *See* Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968*, 82 Harv.L.Rev. 834, 857 (1969). Section 3614, which requires expedited procedures for cases brought under section 3612, but not those brought under section 3610, supports this conclusion.

To accept plaintiffs' argument that sections 3610 and 3612 extend to identical classes of plaintiffs would destroy this statutory pattern, for the procedural prerequisites of section 3610 could then be avoided in every case. The congressional purpose is illustrated by the present case. The injuries TOPIC's members may have suffered from living in segregated communities were caused by no specific single act of the defendants, but by a prolonged practice spanning many years. An injunction, if granted, would stop the practice of racial steering by the defendants, but the desired result of establishing an integrated community would not be achieved immediately. In this context, conciliation at the agency level might not only be an adequate, but a superior, remedy. Moreover, a delay in plaintiffs' access to court would not significantly worsen plaintiffs' injuries, if at all. In sharp contrast is the denial of access to one seeking to rent or purchase housing, where inability to obtain an immediate judicial remedy may constitute a serious hardship.

Finding, as we do, that section 3612 does not create a cause of action for the injury herein alleged permits us to avoid exploring the outer limits of our constitutional power under article III, a difficult and as yet not fully resolved area of the law. While such an inquiry may be unavoidable in a similar suit brought under section 3610 (and we intimate no view of the proper resolution of such case), our interpretation of section 3612 reserves this difficult constitutional question for a case where the issues have more sharply focused by, *inter alia*, prior action on the administrative level. Accordingly, we conclude that plain-

tiffs have failed to state a claim upon which relief could be granted under section 3612. This case is remanded to the district court for dismissal of the complaint.

REVERSED AND REMANDED.

The relevant provisions of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601, et seq., are as follows:

Section 3613. Enforcement by the Attorney General; issues of general public importance; civil action; Federal jurisdiction; complaint; preventive relief

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States

district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

Section 3614. Expedition of proceedings

Any court in which a proceeding is instituted under section 3612 or 3613 of this title shall assign the case for hearing at the earliest practicable date and cause the case to be in every way expedited.